FILE COPY

Office - Supreme Court, U.
FILED
AUG 5 1949
CHARLES ELMORE CROPL

IN THE

Supreme Court of the United States

OCTOBER TERM, 1949.

No. 176

GULF, MOBILE & OHIO RAILROAD COMPANY,
a Corporation,

Appellant,

vs.

JAMES B. MAXIE,

Appellee.

APPELLEE'S REPLY TO PETITION FOR WRIT OF CERTIORARI STATEMENT, BRIEF AND ARGUMENT.

SOL ANDREWS,
Suite 600, 189 W. Madison St.
Chicago 2, Illinois

WILLIAM E. GALLAGHER,
418 Olive Street
St. Louis 2, Missouri

WILLIAM H. ALLEN,
418 Olive Street
St. Louis 2, Missouri

Counsel for Appellee.

The Scheffer Printing Company, FInancial 6-2694

INDEX

PAGE

Statement 1

Argument 2-15

Conclusion 16

AUTHORITIES RELIED UPON.

Agostino v. Pennsylvania RR Co., 50 Fed. Supp. 726 13

Albright v. Pennsylvania RR Co., 183 Md. 421 6

Baird et al v. New York Central RR Co. et al, 299 N. Y. 213, 86 NE (2d) 567 14

Edwards v. Baltimore & Ohio Railroad, 131 Fed (2d) 366 11

Ermin v. Pennsylvania RR Co., 36 Fed Supp 936 5

Great Northern Railway Company v. Industrial Commission, 245 Wisc. 375 12

Patsaw v. Kansas City Southern Railway Company, 56 Fed Supp. 897 7

Prader v. Pennsylvania RR Co., 49 N. E. (2d) 387 14

Shelton v. Thomson, 148 Fed (2d) 1 8

Southern Pacific Co. v. Industrial Accident Commission & Frank Mistretti, 19 Cal (2d) 271 2

Wright v. New York Central RR, 288 N.Y. 719 13

IN THE

Supreme Court of the United States

OCTOBER TERM, 1949.

No. 176

GULF, MOBILE & OHIO RAILROAD COMPANY,
a Corporation,

Appellant,

vs.

JAMES B. MAXIE,

Appellee.

APPELLEE'S REPLY TO PETITION FOR WRIT OF CERTIORARI STATEMENT, BRIEF AND ARGUMENT.

STATEMENT.

James B. Maxie was employed by the Gulf, Mobile & Ohio Railroad Company, as a general car repairman in the Frascati Yard at Mobile, Alabama. He did this work for many years for the Appellant. His duties on one occasion took him out of the State (T 13). On occasion he worked on cars in which there was merchandise (T 16). There is no dispute as to the facts of the accident nor as to the fact that at the time of the accident to Maxie he was working on a car which had been in interstate commerce immediately before and went out into interestate commerce immediately after the repairs. (See plaintiff's exhibit 19 opposite page 58 of transcript.)

ARGUMENT.

In the case of *Southern Pacific Company* v. *Industrial Accident Commission and Frank Mistretti*, 19 Cal. (2d) 271, the Court held that the amendment of 1939 broadened the scope of the application of the F E L A to include those not momentarily actively engaged in interstate movements within the purview of the act, and also that the statute was constitutional. This case was an appeal by a railroad employer against an award of the Industrial Commission in favor of an injured employee. The facts of the employment and the nature of the accident are practically on all fours with those in the case at bar. There the injured man was employed by the railroad as a car repairman and as such his duties required him to make repairs to the wooden portion of freight cars undergoing repair therein. The repairs performed were of both the running repair type, the light repair type and also of the heavy repair type. There the car remained in the shop for a period of 16 days from October 30, 1939 to November 16, 1939 on which latter date the car was returned to the place whence it would be put in use again in interstate commerce on November 17, 1939. From the date of its arrival at the shops to the date of the completion of repairs, the car remained on a track in the shops while the repairs were being performed. The superstructure of the car was stripped leaving only the trucks and steel body frame, and then the superstructure was rebuilt. (This is particularly identical with the facts in the case at bar.) On November 8, 1939, the injured party sustained his accident, a matter of 8 days before the car was sent out into the field again for its use, as compared with a matter

of one day in the case at bar. The railroad employer in that case argued to the court that it would be conceded that if that accident had happened prior to the 1939 amendment then the sole remedy of the injured man would have been under the State Workmen's Compensation Laws. The railroad employer then went on to argue that the amendments of 1939 to the F E L A are so worded as to cover that particular case.

The Court discussed the legislative history regarding the development of the question here involved and went to some length in quoting from the case of *Railroad Commission* v. *Chicago B & Q RR Co.*, 257 U.S. 563, 589 in which Mr. Chief Justice Taft, speaking for the Court, quoted at considerable length, from the Committee reports and explanatory statements of members in charge made in presenting the Bill for passage. We believe it sufficient to call it to this Court's attention a single sentence which appears at *page 278 of the Southern Pacific case* above,

> "Railroad men are frequently injured while moving or working upon cars or engines which have been temporarily withdrawn from interstate commerce and which were, just before or just after the injury, used in such commerce."

In the case at bar it can hardly be said with any seriousness, that the car upon which Maxie was working at the time of his injury was withdrawn from service to a degree more than temporary inasmuch as it came in from interstate service and went out immediately after repairs into interstate service. We believe it would be placing an undue burden upon this Court to define specifically just what length of time in any given case must elapse for that to be the sole determining factor as to whether or not the withdrawal of equipment from interstate service is tem-

porary or permanent. Certainly if it were permanent, it would be required to show that the car never went back into interstate commerce again. The facts here are quite the contrary and so we urge that this Court adopt the interpretation that at best the withdrawal of the car on which Maxie was working be considered as temporarily withdrawn from interstate commerce. We feel that it would do violence to reason to hold that working on a car that just came out of interstate service and then went directly into interstate service could be said to be anything other than directly, closely or substantially affecting Interstate or foreign commerce.

This same case decided that the Amendment of 1939 is not unconstitutional. The Court said at page 279:

> "The point is not well taken. If and when interstate business is clearly a part of the subject to be legislated on, the fact that interstate commerce may be interwoven therewith does not prevent the Congress from exercising its power. (*Baltimore & Ohio RR Co.* v. *Interstate Commerce Commission*, 221 U.S. 612, * * *; *Southern Railway Company* v. *U. S.*, 222 U.S. 20, * * *; *Texas and Pacific Ry. Co.* v. *Rigsby*, 241 U.S. 33, * * *; *National L R B D.* v. *Jones & Laughlin S. Corp.*, 301 U.S. 1, * * *."

The Court went on to say at page 280:

> " * * * One who is repairing such a car is clearly performing a duty which is ' . . . the furtherance of interstate or foreign commerce . . .' Moreover his work does '. . . directly or closely and substantially, affect such commerce.' "

Thus we see that the Court held as a matter of law, that the injured employee was engaged in interstate commerce and was acting within the purview of the 1939 Amendment of the F E L A. In the case at bar, it could hardly be argued with any seriousness that 12 reasonable minds

could differ as to the conclusion to be drawn from the fact that the car on which Maxie was injured was an interstate car and that the time of his injury being one consonant with a temporary withdrawal of the car from service it was a question of law to the effect that Maxie was in interstate commerce or in the furtherance of work closely and substantially related thereto.

In the case of *Ermin* v. *Pennsylvania RR Co.*, 36 Fed. Supp. 936, the Court discussed at considerable length the times over a period of several months that plaintiff was actually engaged in interstate commerce. In that case the facts were quite similar to the facts here at bar in that the cars on which plaintiff was working at the time of his injury were on their way to storage and repairs in the company's repair shop. The Court discussed the issue at some length and stated it to be whether or not the plaintiff at the time of his accident was employed in interstate commerce within the purview of the Federal Employers' Liability Act as amended by the Amendment of 1939. The Court said up to that time it was informed that there had been no reported decision construing the Amendment. The Court discussed the intendments of Congress with respect to this litigation quoting statements made by various Senators in relation thereto.

The Court very aptly said at page 940:

> "There are multitudinous decisions raising hair-splitting interpretations as to whether or not the employee at the time of his accident was actually engaged in interstate commerce. It was to avoid this difficulty that Congress enacted the Amendment. It was, undoubtedly, the intent of Congress to include within the scope of the Federal Employers' Liability Act all employees, even those performing intrastate services whose employment meets the requirement of the Act. *It is no longer subject to doubt that Congress*

had the power to include intrastate employment, which affects interstate commerce, within the scope of the Federal Employers' Liability Act. (Citing cases)" (Emphasis ours.)

The Court went on to say at page 941:

"From the facts stipulated and construing the Amendment literally, as it should be construed, the plaintiff at the time of the accident was engaged in interstate commerce. * * *"

In the case of *Albright* v. *The Pennsylvania RR Co.*, 183 Md. 421, the Court held that the tests as to whether one is engaged in interstate commerce is:

"Were his duties or any part thereof, at the time of injury, in furtherance of interstate commerce or did his duty affect in any way directly or closely and substantially, such commerce? If so, then the employment is in interstate commerce."

The facts of that case were that the plaintiff's decedent was a Chief Clerk at a Produce Terminal whose duties were to watch cars that had been delivered at the end of their transportation. Some of those cars were in intrastate commerce and some in interstate commerce. The Court held that the Amendment of 1939 should be literally construed to effectuate the intention of Congress. The Court also held that when evidence is introduced, tending to show that the employee at the time of injury was engaged in work any part of which was in furtherance of interstate transportation or in work any part of which affects such transportation in any way directly or closely and substantially then it is an interstate case. In the case at bar it could hardly be claimed that repairing cars, how be it heavy repairs made, which come in immediately from interstate shipments and go out immediately after repairs into interstate shipment are not affecting such transpor-

tation. If necessary repairs were not made to these cars they could not possibly be used in interstate shipments. In the *Albright* case the Court held as a matter of law that the evidence showed conclusively that the State Industrial Commission was without jurisdiction in the matter. The Court said in conclusion,

> "We hold, when on an appeal from an award of the State Industrial Accident Commission, the uncontradicted evidence, and all reasonable inference to be drawn therefrom, establishes the fact that the Commission was without jurisdiction to hear a claim, that a question of law is presented, and the trial judge should, upon application by the plaintiff, instruct the jury to reverse the findings of the Commission."

The foregoing quotation from the *Albright* case is nothing new and should need no authority to support it. In the case of *Patsaw* v. *Kansas City Southern Railway Company*, 56 Fed. Supp. 897, the facts briefly were that the injured man for more than a month prior to the accident was a member of a section crew working for the railroad repairing, replacing and keeping in good order tracks which were used interchangeably for interstate and intrastate commerce. At the time of the accident, this particular individual was driving a truck belonging to a contractor and used for the purpose of transporting members of the railroad's repair crews to and from various places in the course of their work. The Court cited with approval the cases of *Ermin* v. *Pennsylvania RR*, *Prader* v. *Pennsylvania RR* and *Edwards* v. *the B & O RR* as ample authority for the position which we take in the case at bar. The Court said at page 900:

> "While it is true, in the instant case, that the appellant was not engaged in interstate commerce at the time he was injured, yet a part of his duties as an employee of the appellee was the maintenance and re-

pair of tracks used for the transportation of interstate trains."

Can it be said that the repair of interstate cars is further removed from interstate commerce than the repair of tracks used for the same purpose?

In the case of *Shelton* v. *Thomson*, 148 Fed. (2d) 1, it was held that the 1939 Amendment made the Federal Employers' Liability Act applicable to any employee of the carrier whose duties shall in part be in furtherance of interstate commerce, and it had for its purpose the broadening of the scope of the Act to include employees whose work was related in functioning of interstate commerce though the employee himself was not engaged in such commerce. (Syllabus 1).

It was also held in that case that the plaintiff who was employed in the railroad storehouse operating a crane which hoisted carwheels into position for repair on freight trains, some of which were used in intrastate and others in interstate commerce, was engaged in furtherance of interstate commerce so as to come within the protection of Federal Employers' Liability Act; "furtherance" being a comprehensive term. This case was decided in 1945 by the Circuit Court of Appeals for the Seventh Circuit. The Court determined two issues in the case, one of which was the applicability of the Federal Employers' Act to the plaintiff's employment which was challenged. The facts of the case were briefly that the plaintiff was employed by the Chicago & North Western Railroad for 13 or 14 years and started to work on the crane in question when it was new in 1937. He left the job and came back to work on it again in March or April of 1942. The crane was provided with a winter and summer fan, which helped to blow the heat of the motor away from the cab in the summer

time and in the winter to blow it into the cab. Plaintiff got sick as a result, it was alleged, of being exposed to the condition of work in the cab of the crane.

The Court said at page 2 of the *Shelton* case the following:

> "Appellant contends that plaintiff does not come within the protection of the Federal Employers' Liability Act. This Act was amended in 1939 to read:
>
> 'Any employee of a carrier, any part of whose duties as such employee shall be the *furtherance of interstate or foreign commerce;* or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter.' 45 U S C A section 51.
>
> "Prior to this Amendment the Act provided for the employers' liability to an employee for injuries suffered only when the employee was engaged in 'such commerce' which phrase referred to 'commerce between any of the several states'.
>
> "Appellant argues that plaintiff, employed in the railroad storehouse, operating a crane, which hoisted carwheels into position for repair on freight trains, some of which were used in intra and others in interstate commerce, was not one who could conceivably be said to be engaged in interstate commerce.
>
> "*However, we have before us, for construction, the amended act, not the original section. There can be no doubt but that the Amendment was intended to broaden the scope of the Act to include employees whose work was related to the functioning of interstate commerce.* Concededly the relationship between the encompassed occupation and the actual transportation in interstate commerce has become more tenuous as this law has developed. It was this fact, no doubt, that caused Congress to enlarge the scope of the Act by

stating that all employment in '*furtherance* of interstate * * *,' are within the Act. The word 'furtherance' is a comprehensive term.

"It's periphery may be vague, but admittedly it is both large and elastic. *It would not be an undue stretching of it to hold that one who is engaged with others in the process of repairing the cars so that it may thereafter be moved in interstate (or by happenstance in intrastate), is engaged in an occupation 'in furtherance' of interstate commerce.* (Emphasis ours).

"A car cannot travel even in interstate commerce, without wheels. Ordinarily a car is as usual in interstate as in intrastate commerce. The same crane which plaintiff operated, moved many articles. Some were used on cars which moved in interstate commerce. No one in the employ knew where the carwheel would be used. Perhaps the success of the repair efforts would determine its future use."

Could railroads engage in any commerce without cars!

We feel that Mr. Justice Evans, who delivered the opinion of the Court, pleaded our case eloquently and we adopt his language. With this Court's indulgence we shall quote further from the same case following the above quotation.

"The report of the Senatorial Committee indicates that the Amendment was intended to extend the application of the Federal Employers' Liability Act to employees, like plaintiff, who are engaged in work which left them and their attorney in deepest doubt as to the law which governs their employers' liability and their right to recover damages for injuries which they might receive. The Amendment was, we believe, a much needed one—and the selection of the phrase, '*furtherance* of interstate * * * commerce' to accomplish the purpose of clarification, an effective and purposeful one."

What chaos would ensue to hold differently at this late date.

Thus by analogy if a crane used to put wheels on cars would bring an employee within the purview of the Amendment, certainly the individual who was more closely related to the repairs of the car than the crane operator by virtue of his repairing the cars themselves should most certainly be considered to be also within the purview of the Amendment.

In the case of *Edwards* v. *Baltimore & Ohio Railroad*, decided by the Circuit Court of Appeals for the Seventh Circuit, reported in *131 Fed. (2d) 366*, in 1942 the Court said at page 369:

> "Despite any question as to whether plaintiff might have recovered under the original act (See *New York Central Ry.* v. *Marcone, 281 U.S. 345, 50 S C C 294, 74 L E D. 892*), it is clear that he is within the scope of the Amendment. Under the original statute experience demonstrated continued difficulty in ascertaining when the work of an employee was part of interstate commerce. The Amendment, much wider in scope, was inspired by a desire to avoid such confusion. Congress' intent to include any employee who performed services which in any way further or affect interstate commerce is clear. *Ermin* v. *Pennsylvania Ry., D C N Y, 36 F. Supp. 936; Southern Pacific Co.* v. *Industrial Accident Commission, C A L App. 113, B 2d 768, 770 affirmed by California Supreme Court in 19 CAL. 2d 883, 120 D 2d 888; Piggue* v. *Baldwin, 154 Kan. 708, 121 B. 2d 183; Louisville & N. C. Potts, Tenn. Sup. 158 S. W. 2d 729.* Inasmuch as this locomotive was used in interstate commerce and was destined to resume such service as soon as repaired, plaintiff, engaged in repairing it and fitting it for further commerce, thereby furthered and substantially affected interstate commerce within the meaning of the law."

So also did plaintiff in the case at bar, by doing his repair work on these cars, repairing the same, especially the one mentioned in the case, for further interstate commerce,

thereby furthered and substantially affected interstate commerce within the meaning of the law.

In the case of *Great Northern Railway Company* v. *Industrial Commission, 245 Wisc. 375* the same question of the applicability of the Federal Employers' Liability Act, as amended to certain types of employment was decided. In that case we believe the facts were much more remotely connected with the Amendment than the case at bar. In the *Great Northern* case the facts briefly were that certain ore docks located at Superior, Wisconsin were closed between the period of December 5, 1941 to April 4, 1942. It was customary for repairs to the docks to be made during the period that the docks were closed down and not operated for the interstate commerce which it ordinarily was used for, to-wit: that of handling cars with ore in interstate shipments. On December 24, 1941 the injured man, Chris Hammer, was injured fatally while engaged in work connected with the general repairs of the ore docks. When injured, Hammer was acting as a signal man on a locomotive crane. This crane was equipped with a derrick boom and was engaged in loading timbers from a pile on the ground to flatcars about 35 feet from the ground on a trestle approach to one of the ore docks. While he was so employed, the locomotive crane on which he was standing was struck by another locomotive crane causing him to be thrown to the ground about 35 feet and killed. The Court went into an exhaustive discussion of the cases which have been called to the attention of this Court *supra* and distinguished the withdrawal of equipment for considerable periods of time which would have taken the equipment out of the purview of the Federal Employers' Liability Act prior to the Amendment from the interpretation to be given the same following the Amendment of 1939. It's discussion on that point appears

on page 383 of the opinion. The Court in the *Great Northern* case quoted from the case of *Oregon Short Line R. Co. v. Gubler, 9 Fed. (2d) 495.* From the quotation it becomes apparent that even before the 1939 Amendment that Court held that repairs made that were in connection with the furtherance of commerce was work that constituted interstate commerce as distinguished from purely new construction. The Court went on to say that Hammer was engaged in interstate commerce when injured.

In the case of *Wright* v. *New York Central RR, 288 N.Y. 719,* the Court held that a boilermaker working on a locomotive engine which had been withdrawn from interstate transportation from which the fire had been drawn and the water drained, and which was unable to function and had no assignment, was nevertheless working under the Federal Employers' Liability Act as amended in 1939. This was decided on June 18, 1942.

In the case of *Agostino* v. *Pennsylvania RR Co., 50 Fed. Supp. 726,* an exhaustive list of cases had been submitted to the Court by counsel, touching upon the question before this Court, many of which have been cited and quoted from in this Brief. The Court there said at page 729:

> "The weight of authority is to the effect that the Amendment should be liberally construed so as to extend the protection of this Act to all employees, any part of whose duties furthers or affects interstate commerce 'in any way'."

The facts in that case were also remote in point of time from the actual use of the instrumentality involved in interstate commerce. The plaintiff in the *Agostino* case was injured a month before actual transportation of revenue freight in both interstate and intrastate commerce on the track involved was begun. The Court in its conclusions said at page 730:

"The conclusion seems inescapable that the construction work, while new, was only an improvement such as an extension, alteration, replacement or repair and, therefore, the plaintiff was engaged in interstate commerce."

In the case of *Prader* v. *Pennsylvania RR, 49 NE 2d, 387* the plaintiff was interrupted in his work by his foreman who instructed him to go to a village some 6 miles away for the purpose of procuring a rule book through which he would familiarize himself with his duties of a flagman. The question in that case was twofold, to-wit: (1) was he entitled to the benefits of the Federal Employers' Liability Act as amended by being within interstate commerce; and (2), was the 1939 Amendment constitutional. The Court held in that case in the affirmative on both questions. The Court cited all of the cases cited by the plaintiff in the case at bar.

The most recent decision bearing on this question is the case of *Baird et al* v. *New York Central RR Co., et al, in 299 N.Y. 213, 86 NE (2d) 567* and decided on May 26, 1949, appearing in the advance sheets. That case held that where craftsmen were employed at all times in the back shop of an interstate railroad within a State and the work affected dead locomotives used in interstate transportation, but withdrawn from active service and within shop, the work was performed in furtherance of interstate commerce so as to preclude Workmen's Compensation awards and bring the craftsmen within the purview of the Federal Employers' Liability Act as amended in 1939. The Court in that case said, that reading the language apart from the legislative and judicial history it would have to say that the activities of each of the workers whose claims were involved did further interstate commerce and certainly affected it closely and substantially since it is undisputed

that the every day operation of the railroad required that those car repair shops be busy repairing the railroad's locomotives. Certainly by analogy it must be said that repairing freight cars that come in and out of the shop from and to interstate transit were such as to compel the conclusion that work done upon it would be in furtherance of and closely affecting interstate commerce. The Court said that the "pin point rule" was completely wiped out. It cited the case of *Wright* v. *New York Central Railroad*, *288 N.Y. 719* in which a petition for Writ of Certiorari was denied by this Court, (see *317 U.S. 668*). The Court in the *Baird* case discussed the Committee of Congress' Report and quoted from it as follows:

> "The adoption of the proposed Amendment will, to a very large extent, eliminate the necessity of determining whether an employee, at the very instant of his injury or death was actually engaged in the movement of interstate traffic. *If any part of the employee's duty (at the time of his injury or death) directly, closely or substantially affected interstate or foreign commerce, the claimant would be considered entitled to the benefits of the Act.*" (Emphasis ours.)

The Court went on to say that Congress intended not only to abolish the pinpoint rule but also to broaden the whole concept of interstate transportation as covered by the Federal Employers' Liability Act using sweeping language in doing so. The Court went on to say that the clear trend of decisions on this matter in the Federal Court of Appeals and State Courts of last resort are in conformity with the decision in that case, citing the *Shelton*, *The Great Northern* cases cited above and also the *Maxie* case which is the case before this Court.

We call to this Court's attention the fact that of all the cases cited and quoted from by appellant in the instant case not one was decided subsequent to the Amendment of 1939.

CONCLUSION.

We respectfully submit that appellant has failed to demonstrate that the Supreme Court of Missouri erred in any of the 6 specifications of error urged by Appellant. In view of the fact that the pinpoint rule has been abolished and wiped out by the Amendment and in the light of all decisions that a car only temporarily withdrawn from movement does not lose its interstate character by that alone, it would place an extreme burden upon litigants and Courts to reassert the pinpoint rule by saying that only short temporary withdrawals would not affect the interstate character of the employee's work, as distinguished from temporary withdrawals of a slightly more lasting nature. Where would the line be drawn? Would the point of demarcation be limited to hours or days or fractions thereof?

We cannot take appellant's contention of the unconstitutionality of the statute seriously at all.

We, therefore, ask that the petition for Certiorari be denied.

Respectfully submitted,

Sol Andrews,
Suite 600, 189 W. Madison St.
Chicago 2, Illinois

William E. Gallagher,
418 Olive Street
St. Louis 2, Missouri

William H. Allen,
408 Olive Street
St. Louis 2, Missouri

Attorneys for appellee.